

4. The gravamen of Lucky 7's proposed third party complaint is against Yazaki for allegedly failing to mitigate its loss.

5. Yazaki's contract and the basis of its complaint, however, is with Timely, not Lucky 7. If Yazaki had a duty to mitigate, it would be based upon and arise from the contract with Timely, a contract to which Lucky 7 is NOT a party.

6. Seeking to cast Yazaki as a third party defendant, Lucky 7 fails to identify the basis and source of Yazaki's alleged mitigation duty to Lucky 7.

7. If Lucky 7 is to be a party, conceptually, defendant Timely should have brought Lucky 7 in under Rule 14, as third party defendant. However, the fact that Timely did not bring Lucky 7 in as third party defendant does not create or expand its rights against plaintiff.

8. For the foregoing reasons, the intervention of Lucky 7 as proposed in its third party complaint should be denied.


JAMES F. CAMPISE

Sworn to before me
this 20 day of June, 2008



CHRISTOPHER RALEIGH
Notary Public, State of New York
No. 02RA4800776
Qualified in New York County
Commission Expires August 10, 2010